A

Zamri bin Ibrahim & Anor v Khoo Kah Hock

B HIGH COURT (KANGAR) — CIVIL SUIT NO RA-22NCvC-6–11 OF 2018
ABU BAKAR KATAR J
31 OCTOBER 2019

C *Civil Procedure — Striking out — Action — Plaintiffs' case a plain and obvious one for striking out summarily — Parties raised serious issues of fact and law concerning case which could not be resolved by way of minute examination of affidavit evidence — Full trial with viva voce evidence necessary*

D IJM Corporation Bhd ('IJM') had sued the plaintiffs ('the first suit') for unpaid maintenance charges in respect of an office unit ('the property') that was sold to them. In their defence, the plaintiffs claimed IJM failed to deliver vacant possession of the property to them and counter-claimed for delivery of vacant possession and damages. In its reply to the defence, IJM alleged that vacant E possession of the property was delivered to the plaintiffs via a letter dated 9 October 1996 ('the letter'). At the trial of the first suit, the defendant herein ('Khoo') was the sole witness who testified for IJM. He maintained that vacant possession of the property was delivered to the plaintiffs via the letter but that its maker ('Goh') could not be called to testify because he had resigned from F IJM and could not be located. The trial judge held the letter to be inadmissible since its maker was not called and there was also no proof that it was served on the plaintiffs. The trial judge dismissed IJM's claim and allowed the counter-claim. IJM was ordered to deliver up vacant possession of the property and to pay the plaintiffs RM467,568 in damages. In allowing IJM's appeal G against the decision, the Court of Appeal ('COA') decided that the letter showed that vacant possession had been delivered to the plaintiffs. Meanwhile, on discovering from a land search that the title to the property was still in IJM's name, the plaintiffs sued IJM ('the second suit') for damages for refusing to transfer the property to them. At the trial of the second suit, IJM's sole witness H ('Dato Toh') testified that the letter was not meant to deliver vacant possession of the property to the plaintiffs. That statement was confirmed by Goh when the plaintiffs managed to locate him. Goh told the plaintiffs that the purpose of the letter was not to deliver vacant possession of the property to the them but to 'shift the burden of paying maintenance cost for the property from IJM to I the plaintiffs'. These revelations about the letter by Dato Toh and Goh caused the plaintiffs to file the instant suit for, inter alia, a declaration that Khoo's testimony in the first suit — that vacant possession had been delivered to the plaintiffs via the letter and that Goh could not be located to testify — were fraudulent and influenced the COA to reject the plaintiff's counterclaim

against IJM when it decided the appeal in the first suit. Khoo applied to strike out the instant action under O 18 r 19 of the Rules of Court 2012 saying: (a) he was legally immune from being sued in respect of what he had testified in the first suit; (b) the plaintiffs' action was time-barred under the Limitation Act 1953 since the instant action was filed more than six years after Khoo had testified in the first suit; (c) the matters/issues raised were already determined in the two previous suits such that res judicata and/or issue estoppel applied; and (d) the plaintiffs failed to act with reasonable diligence in discovering the alleged fraud during the trial of the first suit. In reply, the plaintiffs said that: (i) the instant suit did not claim any damages against Khoo but only sought certain declarations in order that they may be used to impeach the COA's decision; (ii) the action was not time-barred because the fraud committed by Khoo was only discovered when the plaintiffs met with Goh and after Dato Toh had testified at the trial of the second suit; and (iii) res judicata and issue estoppel did not apply because the cause of action and issues raised in the instant suit were totally different from those raised in the first and second suits.

Held, dismissing the striking-out application:

(1) This was not a plain and obvious case that could be struck out summarily under O 18 r 19 and/or O 92 r 4 of the Rules of Court 2012. Both parties had raised many issues of fact and law which could not be resolved through a minute examination of affidavits but had to be meticulously addressed and determined at a full trial (see paras 40–41).

(2) The instant action was based on an allegation of fraud committed by the defendant that influenced the COA to allow IJM's appeal in the first suit. The reason for the action was not to claim damages from the defendant but to establish fraud so that it could be used to impeach the COA's decision. The filing of a fresh action to establish fraud in a full trial to be used later in an impeachment action at the COA was in compliance with requirements. Immunity did not apply to the defendant for the very reason the plaintiffs were not claiming damages against him. It was the judgment that was being targeted and not the defendant. He was just a conduit in this collateral attack. The law allowed a judgment obtained by fraud to be set aside regardless of who had committed the fraud (see paras 27 & 31).

(3) Since the action involved fraud, s 29 of the Limitation Act 1953 provided that any period of limitation prescribed under the act shall not begin to run until the plaintiff had discovered the fraud or could with reasonable diligence have discovered it. The defendant's contention that the alleged fraud could have been discovered during the first suit was not acceptable because Goh, who was the maker of the letter, was never called to testify causing the trial court to reject the letter. Thus, fraud was not an issue then. Fraud was only discovered and became an issue when the COA

A accepted the defendant's testimony regarding the letter and when the plaintiffs met with Goh about the letter. The action was therefore filed within time (see paras 32–34).

(4) Res judicata and issue estoppel had no application because the issues in the first suit and the second suit were not the same as the one in the instant action. Having same facts did not amount to res judicata and/or issue estoppel. Only same issue and cause of action would cause res judicata to set in (see para 36).

[Bahasa Malaysia summary

IJM Corporation Bhd ('IJM') telah menyaman plaintif-plaintif ('guaman pertama') untuk caj penyelengaraan yang tidak dibayar berkaitan unit pejabat ('hartanah tersebut') yang telah dijual kepada mereka. Dalam pembelaan mereka, plaintif-plaintif mendakwa IJM telah gagal untuk menyerahkan milikan kosong hartanah tersebut kepada mereka dan menuntut balas untuk serahan milikan kosong dan ganti rugi. Dalam jawapannya kepada pembelaaan itu, IJM mendakwa bahawa milikan kosong hartanah tersebut telah diserahkan kepada plaintif-plaintif melalui surat bertarikh 9 Oktober 1996 ('surat tersebut'). Dalam perbicaraan guaman pertama, defendan ('Khoo') adalah satu-satunya saksi yang memberi keterangan untuk IJM. Dia menegaskan bahawa milikan kosong hartanah tersebut telah diserahkan kepada plaintif-plaintif melalui surat tetapi bahawa pembuatnya ('Goh') tidak boleh dipanggil untuk memberi keterangan kerana dia telah meletak jawatan daripada IJM dan tidak dapat dikesan. Hakim perbicaraan memutuskan bahawa surat itu tidak boleh diterima masuk kerana pembuatnya tidak dipanggil dan juga tiada bukti bahawa ia telah disampaikan ke atas plaintif-plaintif. Hakim perbicaraan telah menolak tuntutan IJM dan membenarkan tuntutan balas itu. IJM telah memerintahkan untuk serahan milikan kosong hartanah tersebut dan untuk membayar plaintif-plaintif RM467,568 sebagai ganti rugi. Dalam membenarkan rayuan IJM terhadap keputusan itu, Mahkamah Rayuan ('MR') telah memutuskan bahawa surat telah menunjukkan bahawa milikan kosong telah diserahkan kepada plaintif-plaintif. Manakala, apabila mendapati daripada carian tanah bahawa hak milik hartanah tersebut masih dalam nama IJM, plaintif-plaintif telah menyaman IJM ('guaman kedua') untuk ganti rugi kerana enggan memindah milik hartanah tersebut kepada mereka. Semasa perbicaraan guaman kedua, satu-satunya saksi IJM ('Dato Toh') telah memberi keterangan bahawa surat itu tidak bermaksud untuk menyerahkan milikan kosong hartanah tersebut kepada plaintif-plaintif. Kenyataan tersebut telah disahkan oleh Goh apabila plaintif-plaintif berjaya mengesannya. Goh memberitahu plaintif-plaintif bahawa tujuan surat itu adalah untuk tidak menyerahkan milikan kosong hartanah tersebut kepada mereka tetapi untuk 'shift the burden of paying maintenance cost for the property from IJM to the plaintiffs'. Pendedahan tersebut tentang surat itu oleh Datuk Toh dan Goh menyebabkan

plaintif-plaintif memfailkan guaman ini untuk, antara lain, suatu deklarasi bahawa keterangan Khoo dalam guaman pertama — bahawa milikan kosong telah diserahkan kepada plaintif-plaintif melalui surat dan Goh tidak dapat dikesan untuk memberi keterangan — adalah palsu dan mempengaruhi MR untuk menolak tuntutan balas plaintif-plaintif terhadap IJM apabila ia memutuskan rayuan dalam guaman pertama. Khoo memohon untuk membatalkan tindakan ini di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 mengatakan: (a) dia kebal di sisi undang-undang daripada disaman berkaitan apa yang diberi keterangan olehnya dalam guaman pertama; (b) tindakan plaintif-plaintif telah luput had masa di bawah Akta Had Masa 1953 oleh kerana tindakan ini yang difailkan lebih dari enam tahun selepas Khoo memberi keterangan dalam guaman pertama; (c) perkara/isu yang ditimbulkan telahpun ditentukan dalam dua guaman terdahulu yang mana res judicata dan/atau isu estopel adalah terpakai; dan (d) plaintif-plaintif telah gagal untuk bertindak dengan ketekunan yang wajar apabila mendapati berlaku fraud yang dikatakan semasa perbicaraan guaman pertama. Dalam jawapan, plaintif-plaintif mengatakan bahawa: (i) guaman ini tidak menuntut apa-apa ganti rugi terhadap Khoo tetapi hanya memohon beberapa deklarasi tertentu bagi tujuan untuk digunakan bagi mencabar keputusan MR; (ii) tindakan itu tidak luput had masa kerana fraud yang telah dilakukan oleh Khoo hanya ditemuii apabila plaintif-plaintif berjumpa dengan Goh dan selepas Datuk Toh memberi keterangan semasa perbicaraan guaman kedua; dan (iii) res judicata dan isu estopel tidak terpakai kerana kausa tindakan dan isu estopel yang ditimbulkan dalam guaman ini sama sekali berbeza daripada yang ditimbulkan dalam guaman-guaman pertama dan kedua.

Diputuskan, menolak permohonan pembatalan:

(1) Ini bukan kes yang biasa dan jelas yang boleh dibatalkan terus di bawah A 18 k 19 dan/atau A 92 k 4 Kaedah-Kaedah Mahkamah 2012. Kedua-dua pihak telah menimbulkan banyak isu berhubung fakta dan undang-undang yang tidak boleh diselesaikan melalui pemeriksaan teliti afidavit tetapi perlu dikemukakan dan ditentukan dengan terperinci dalam perbicaraan penuh (lihat perenggan 40–41).

(2) Tindakan ini berdasarkan dakwaan fraud yang dilakukan oleh defendan yang mempengaruhi MR untuk membenarkan rayuan IJM dalam guaman pertama. Sebab untuk tindakan itu tidak boleh menuntut ganti rugi daripada defendan tetapi untuk membuktikan fraud adalah agar ia boleh digunakan untuk mencabar keputusan MR. Pemfailan tindakan baharu untuk membuktikan fraud dalam perbicaraan penuh untuk digunakan kemudian dalam tindakan mencabar di MR adalah mematuhi keperluan. Kekebalan tidak terpakai kepada defendan untuk sebab plaintif-plaintif tidak menuntut ganti rugi terhadapnya. Ia adalah penghakiman yang disasarkan dan bukan defendan. Dia hanya saluran dalam serangan kolateral ini. Undang-undang membenarkan

penghakiman yang diperoleh melalui fraud diketepikan tanpa mengira siapa yang telah melakukan fraud itu (lihat perenggan 27 & 31).

(3) Oleh kerana tindakan itu melibatkan fraud, s 29 Akta Had Masa 1953 memperuntukkan bahawa apa-apa tempoh had masa yang ditetapkan di bawah akta tersebut tidak akan bermula berkuat kuasa sehingga plaintif mendapati fraud itu atau dengan ketekunan wajar mendapatinya. Hujah defendan bahawa fraud yang dikatakan mungkin boleh ditemui semasa guaman pertama tidak boleh diterima kerana Goh, yang merupakan pembuat surat itu, tidak dipanggil untuk memberi keterangan menyebabkan mahkamah perbicaraan menolak surat itu. Oleh itu, fraud bukan isu pada masa itu. Fraud hanya ditemui dan menjadi isu apabila MR menerima keterangan defendan berhubung surat itu dan apabila plaintif berjumpa Goh tentang surat itu. Tindakan itu oleh demikian telah difailkan dalam had masa (lihat perenggan 32–34).

(4) Res judicata dan isu estopel tidak terpakai kerana isu-isu dalam guaman pertama dan kedua tidak sama sepertimana dalam tindakan ini. Dengan mempunyai fakta yang sama bukan merupakan res judicata dan/atau isu estopel. Hanya isu dan kausa tindakan sama membolehkan res judicata terpakai (lihat perenggan 36).]

Cases referred to

Alias bin Othman v Clement Kua Hock Beng & Ors [2018] 7 MLJ 109, HC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)

Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 MLJ 309, CA (refd)

Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1; [2016] 3 CLJ 1, FC (refd)

Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v Malaysia Airlines Bhd and other appeals [2019] 1 MLJ 59, FC (refd)

Legislation referred to

Evidence Act 1950 s 101
Limitation Act 1953 s 29
Rules of Court 2012 O 18 r 19, 19(1)(a), (1)(b), (1)(d), O 92 r 4

Zamri Ibrahim (Zamri Ibrahim & Co) for the plaintiff.
Fazleeza bt Azli (Chan Ban Eng & Co) for the defendant.

Abu Bakar Katar J:

PRINCIPLE IN STRIKING OUT ACTION

[1] Time and again this subject had been dealt with by the courts and the decisions had never strayed from the settled principle that a claim can only be struck out under O 18 r 19 of the ROC if it is plainly and obviously unsustainable.

[2] The same was repeated by the Federal Court in its recent decision in the case of *Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v Malaysia Airlines Bhd and other appeals* [2019] 1 MLJ 59. As useful guide and for ease of reference the Federal Court had highlighted the following *locus classicus* on this subject:

> [16] The principle for *striking out of pleadings* pursuant to O 18 r 19 of the ROC is well settled. It is applicable only in a plain and obvious case or where a claim is, on the face of it, obviously unsustainable (see *Bandar Builder Sdn Bhd v United Malayan Banking Corp* [1993] 3 MLJ 36; [1993] 4 CLJ 7 (SC); *Hubbuck & Sons, Ltd v Wilkinson, Heywood & Clark, Ltd* [1899] 1 QB 86; *Attorney-General of the Duchy of Lancaster v London and North Western Railway Co* [1892] 3 Ch 274).
>
> [17] The tests for striking out application under O 18 r 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* are, inter alia, as follows:
>
> (a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;
>
> (b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable;
>
> (c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence; and
>
> (d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the ROC; and
>
> (e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.
>
> [18] The Court of Appeal, in *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473; [2012] 1 CLJ 75, had adopted the well-settled principle of striking out in the following passage:
>
> A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking viva voce evidence during trial (see *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (FC)).

A [19] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously', ie, the degree of unsustainability must appear on the face of the statement of claim without having to go into a lengthy and mature consideration in detail. If one has to go into
B a lengthy detailed argument and mature consideration of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at the trial.

[20] The established rule on this point is that the court should not examine the evidence in summary proceedings in such a way as to amount to conducting a trial
C on the conflicting affidavit evidence. As rightly said by Lord Diplock in the House of Lords case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at p 407:

> ... The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> D It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ...

E This passage was cited with approval by the Privy Council in the Malaysian case of *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212; [1979] 1 LNS 18.

[3] It was explained by the Court of Appeal in *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as*
F *Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309 that whether a case is plain or obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success.

G **[4]** The issue now is whether the plaintiffs' claim is 'entirely hopeless, baseless or without foundation in law or in equity' that warrants it to be struck out summarily. Based on the above principles this court only needs to look at the content of the plaintiff's statement of claim whether it raises any cause of action to be tried or that the claims are just frivolous or vexatious and totally
H unsustainable.

THE PLAINTIFF'S STATEMENT OF CLAIM

[5] IJM Corporation Bhd ('IJM') filed a suit on 27 July 2001 at
I Butterworth Sessions Court under under Suit No 52-621-2001 that was later transferred to Penang High Court and registered under Suit No 22–223 of 2009 ('first suit') to claim outstanding maintenance charges of an office unit ('office unit') sold to the plaintiffs. In their defence the plaintiffs alleged that IJM had failed to deliver vacant possession of the office unit and counter

claimed for IJM to deliver vacant possession and to pay damages for late delivery. In its reply IJM alleged that vacant possession of the office unit was delivered through a letter dated 9 October 1996 ('letter'). A

[6] During hearing on 31 March 2011, the defendant who was the only witness for IJM testified that vacant possession was delivered to the plaintiffs through the letter. The defendant admitted that the maker of the letter by the name of Goh Chye Hin had resigned and cannot be traced. B

[7] On 3 June 2011, the learned judge decided to dismiss IJM's claim and allowed plaintiffs' counter claim. IJM was ordered to deliver vacant possession of the office unit to the plaintiff and pay damages of RM467,568. IJM then filed an appeal against the decision of the High Court at the Court of Appeal. C

[8] In his grounds of judgment the learned judge rejected the letter that was marked as ID2 due to the failure of IJM to produce the maker of the letter and to adduce any proof of service of the letter on the plaintiffs. D

[9] Subsequently on 2 May 2013, the plaintiffs conducted an official search of the office unit at the Pendaftar Hakmilik Tanah Pulau Pinang and discovered that the strata title of the office unit had been issued on 1 April 2002 and was still under IJM's name. E

[10] IJM's appeal was heard on 14 May 2013, where it was again argued by IJM that vacant possession of the office unit was delivered to the plaintiffs through the letter as confirmed by the defendant. Apparently the Court of Appeal allowed the appeal. F

[11] In its 'judgment of the court' dated 11 October 2013, the Court of Appeal decided to accept the defendant's testimony that vacant possession of the office unit was delivered to the plaintiffs through the letter. G

[12] On 25 February 2014, the plaintiffs managed to trace Goh Chye Hin at his office at No 14, Tingkat 1, Lebuh Penang, 10200 Penang. Goh Chye Hin confirmed that after resigning from IJM he became a contractor that handled IJM's housing development projects and had been dealing with the defendant. Goh Chye Hin also confirmed that he prepared the letter just to shift the burden of paying maintenance cost of the office unit from IJM to the plaintiffs and not for the purpose of delivering vacant possession to them. H I

[13] Subsequently the plaintiffs filed a suit against IJM at Kangar High Court (Suit No 22NCVC-01–05 of 2014) that was later transferred to Penang High Court (Suit No 22NCVC-13–02 of 2015) and finally transferred to

Georgetown Sessions Court (Suit No PA-B52NCVC-6–02 of 2016) for refusing to transfer the office unit to them ('second suit'). During trial Dato Toh Chin Leong was called as IJM's only witness. He testified that the letter was not meant to deliver vacant possession of the office unit to the plaintiffs.

[14] The plaintiffs alleged that the defendant had committed fraud when he testified that Goh Chye Hin had resigned from IJM and cannot be found whereas he can be traced and had been dealing with the defendant. The defendant had also committed fraud based on the evidence given by both Goh Chye Hin and Dato Toh Chin Leong that the letter was not meant to deliver vacant possession to the plaintiffs.

[15] The fraudulent statement given by the defendant was accepted by the Court of Appeal that caused the plaintiffs to fail in their counter claim.

[16] The plaintiffs filed this action to seek the following declarations:

(a) that the statements given by the defendant on 31 March 2011 in the 2001 suit confirming vacant possession of the office unit to the plaintiffs through the letter and that Goh Chye Hin had resigned from IJM and cannot be traced were fraudulent statements;

(b) that the defendant did not have the authority to verify the content of the letter; and

(c) that the fraudulent statements given by the defendant were null and void.

DEFENDANT'S APPLICATION TO STRIKE OUT

[17] The grounds for the defendant's application as in the notice of application and affidavit in support can be summarised as follows:

(a) the defendant as a witness in the first suit enjoyed immunity from this action;

(b) this action is time barred under the Limitation Act 1953;

(c) the matters and/or issues in this action had been raised and determined in the first suit and second suit thus res judicata and/or issue estoppel;

(d) paras 29–32 of the statement of claim pertaining to the defendant's testimony given in the first suit and one Goh Chye Hin ought to have been raised and /or adduced in the first suit or as fresh or further evidence in IJM's appeal at the Court of Appeal and/or the plaintiff's application for leave at the Federal Court;

(e) paras 29–32 of the statement of claim are mere repetition of the matters raised and adduced by the plaintiff in the notices of motion for review at the Court of Appeal and at the Federal Court;

(f) matters set out under paras 29–32 of the statement of claim had been determined and/or adjudicated by the Court of Appeal and the Federal Court thus res judicata and/or issue estoppel; and

(g) this action is an afterthought.

DEFENDANT'S SUBMISSIONS

[18] According to the defendant as witness in the first suit he enjoys immunity from this action that is based on the testimony given by him in the first suit.

[19] On limitation the defendant argued that this action is for declaration that he had given fraudulent testimony on 31 March 2011 during hearing of first suit that under the Limitation Act 1953 should be filed on or before 30 March 2017. Since this action was filed on 27 November 2018 therefore it is time barred. Alternatively the defendant submitted that the plaintiffs did not act with reasonable diligence in discovering the alleged fraud during trial of first suit.

[20] The defendant further submitted that the matters and/or issues set out in this action are the same as in the first suit and second suit. In the first suit IJM was claiming for outstanding service charges and outgoings against the plaintiffs and in the second suit the plaintiffs were claiming against IJM for termination of sale and purchase agreement dated 6 May 1996. Therefore the matters and/or issues raised in this action are res judicata and/or issue estoppel. Alternatively the defendant submitted that paras 29–32 of the statement of claim pertaining to the defendants testimony given in the first suit and one Goh Chye Hin ought to have been raised and/or adduced in the first suit or as fresh or further evidence in IJM's appeal at the Court of Appeal and/or the plaintiffs application for leave at the Federal Court. Paragraphs 29–32 of the statement of claim are mere repetition of the matters raised and adduced by the plaintiff in the notices of motion for review at the Court of Appeal and at the Federal Court.

[21] Lastly the defendant submitted that this action is an afterthought after the plaintiffs loss their cases in first suit and second suit and that this action is an attempt to re-open or re-litigate or re-argue the merits of the court proceedings in first suit and second suit.

PLAINTIFFS' SUBMISSIONS

[22] Plaintiffs submitted that immunity is not applicable as the plantiffs is only claiming for declarations and not damages against the defendant that will be used to impeach the earlier decision of the Court of Appeal. Thus the defendant will not suffer any damages in this action.

[23] According to the plaintiffs this action is within time as the cause of action started to accrue when the fraud committed by the defendant was discovered through a meeting with Goh Chye Hin on 25 February 2014 and statement given by Dato Toh Chin Leong during trial of second suit. The plaintiffs argued that the issue that they did not act with reasonable diligence in discovering the alleged fraud during trial of first suit does not arise because the letter that was issued by Goh Chye Hin was rejected by the learned High Court judge during trial of first suit and marked as 'ID2' for failure of IJM in calling Goh Chye Hin to verify it. Furthermore it was the duty of IJM to call Goh Chye Hin as its witness and not the plaintiffs.

[24] On the issue in this action is res judicata the plaintiffs submitted that the cause of action and issue in this action are totally different from the causes of action and issues in first suit and second suit. The first suit involved outstanding charges claimed by IJM and counter claim by the plaintiffs for failure of IJM to deliver vacant possession and the second suit involved the claim made by the plaintiffs against IJM for failing to transfer the office unit to them. According to the plaintiffs res judicata and issue estoppel does not apply in a case involving fraud because a decision based on fraud can be set aside.

[25] The plaintiffs finally submitted that this action is not an afterthought because the issue on fraud did not exist in first suit and second suit. It only existed when Goh Chye Hin was met on 25 February 2014 and strengthened by the testimonies given by Dato Toh Chin Leong during trial of second suit.

DECISION OF THIS COURT

[26] The first issue is whether the defendant as a witness in the first suit enjoys immunity from this action. It is trite that a witness is protected from any civil action against him for testifying in a trial. The basic rule is to avoid witness from being punished twice, civil action to recover damages as well as criminal action for perjury. This was explained in the case of *Alias bin Othman v Clement Kua Hock Beng & Ors* [2018] 7 MLJ 109 that was referred to by both parties:

> [18] For the purpose of this present application, I must state that the principle of witness immunity is entrenched in the common law. Historically, the rule that no civil action exists in tort for perjury or conspiracy to commit injury originated in the English common law nearly 400 years ago. In the English case of *Damport v*

Sympson [1595] 78 ER 769 a plaintiff sought to recover damages against a witness who had testified in an earlier case that involved the misappropriation of a silver fountain. The plaintiff alleged that the witness gave false testimony regarding the fountain value resulting in a judgment of only L200 instead of the fountain's actual value of L500. The plaintiff subsequently obtained a lower court judgment of L300 in damages for the witness perjury. On appeal, however, the Damport court reversed the plaintiff's judgment for L300 against the witness and held that the plaintiff could not maintain a perjury action for damages against the witness. The Damport court reasoned that a court might punished a defendant twice, by a civil action for damages and a criminal action for perjury. To avoid punishing a defendant twice, the Damport court declared that courts should punish perjurers only by criminal actions. The Damport court also reasoned that a civil action would discourage a witness from testifying in court, and that no precedent existed for a civil action for perjury. Accordingly, the Damport court dismissed the plaintiff's action.

[27] However this action is based on allegation of fraud committed by the defendant that influenced the decision of the Court of Appeal made on 14 May 2013 in allowing IJM's appeal in first suit. The reason for this action is not to claim for any damages from the defendant but rather to establish fraud to be used to impeach the said decision of the Court of Appeal. It is actually a collateral attack.

[28] It is an established principle of law that a judgment or order can be impeached if it is proven to be obtained by fraud and the impeachment action must be made through fresh action as decided by the Federal Court in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143:

> But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong v Neotia & Co* [1918] AC 888 and *Jonesco v Beard* [1930] AC 298. The hearing of the action will in a proper case be expedited: *Gordon-Smith v Peizer* [1921] 65 SJ 607.

[29] It is trite that details of fraud must be pleaded and proven. It must be dealt with in a full trial as decided by the Federal Court *in Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 3 CLJ 1:

> [34] The case of *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346; [2001] 2 CLJ 321 is a good example involving an action to set aside an earlier judgment of a court on ground of fraud, and the court dealt with it in a full trial, but not in a summary striking out process. In that case, the Court of Appeal stressed on the requirement that the allegation of fraud must be established by evidence, and affirmed that whether the test has been met in any given case must depend on the facts and circumstances of the particular case and evidence needs to be adduced during trial.

[30] The impeachment action must be by way of fresh action not in the same action where the impugned earlier judgment was made as explained by the Federal Court in *Seruan Gemilang Makmur Sdn Bhd*:

> [32] The impeachment action must be by way a fresh action, not in the same action where the impugned earlier judgment was made. As early as 1935, Whitley J in the Penang High Court case of *Cheah Wong Nyan and Cheah Sin Kee v KALRM Palaniappa & Ors* [1935] 1 MLJ 31; [1934] 1 LNS 10, relying on English authorities of*Cole v Langford* [1898] 2 QB 36; *Priestman v Thomas* [1884] 9 PD 210; *The Duches of Kingston's Case* [1776] 2 Smith's LC (13th Ed) 644 and *Patch v Ward* [1867] LR 3 Ch App 203, ruled that, 'The court undoubtedly has jurisdiction to set aside a judgment obtained by fraud in a subsequent action brought for that purpose, the proper remedy being an original action and not a re-hearing'.

[31] What the plaintiffs did in filing a fresh action to establish fraud in a full trial to be used later in an impeachment action at the Court of Appeal is actually complying with the requirements. Immunity does not apply to the defendant for the very reason that the plaintiffs were not claiming for damages against him thus he is not being punished twice. It is the judgment that is being targeted and not the defendant. The defendant is just a conduit in this collateral attack. Furthermore the law allows judgment obtained by fraud to be set aside regardless of who committed the fraud.

[32] The defendant alleged that this action is time barred because the alleged fraudulent testimony was given on 31 March 2011 during hearing of first suit but this action was filed on 27 November 2018. It was also alleged that the plaintiffs would be able to discover the alleged fraud if they used reasonable diligence. On the face of it these allegations might be true. However this action involves fraud where the limitation period is postponed as provided under s 29 of the Limitation Act 1953:

> 29 Where, in the case of any action for which a period of limitation is prescribed by this Act, either —
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

[33] So the issues are when did the plaintiffs discover the alleged fraud and could the fraud be discovered earlier if they used reasonable diligence.

[34] The defendant is blaming the plaintiffs for not using reasonable diligence in discovering the alleged fraud. According to the defendant the allegation of fraud should have been discovered during first suit if not for the plaintiffs tracing and meeting Goh Chye Hin almost three years after the testimony given by the defendant and after the first suit was concluded through the decision of the High Court, Court of Appeal and Federal Court (para 21 written submissions for the defendant dated 5 July 2019). This argument is unacceptable because Goh Chye Hin who was the maker of the letter was supposed to be IJM's witness in first suit. Since IJM was the claimant in first suit therefore IJM was the one who supposed to produce Goh Chye Hin to prove its claim (s 101 of the Evidence Act 1950). Furthermore reading the grounds of judgment of the learned High Court judge in first suit (exh ZI2) it is clear that the letter was only marked as ID 2. The letter was rejected by the High Court thus fraud was not an issue then. Fraud was only discovered and became an issue when the Court of Appeal accepted the testimony of the defendant on 11 October 2013 regarding the letter and the meeting with Goh Chye Hin the maker of the Letter on 25 February 2014. Therefore this action is still within time.

[35] In any event the evidence given by Dato Toh Chin Leong during trial of second suit was not raised by the defendant on this limitation of time issue.

[36] The defendant's argument that the matters and/or issues in this action had been raised and determined in the first suit and second suit thus res judicata and/or issue estoppel is totally wrong. The issue in this action is the allegation of fraud committed by the defendant. This is totally different from the issue in the first suit regarding outstanding charges on the office unit claimed by IJM against the plaintiffs and the plaintiffs' counter-claimed for vacant possession of the office unit and damages for late delivery against IJM and the issue in the second suit regarding failure to transfer the office unit from IJM to the plaintiffs. Having same facts does not amount to res judicata and/or issue estoppel. Only same issue and cause of action will cause res judicata to set in. This was confirmed by the Supreme Court (as it then was) in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189:

> Thus, there are in fact two kinds of estoppel per rem judicatum. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.

[37] The facts at paras 29–32 of the statement of claim pertaining to the defendant's testimony given in the first suit and one Goh Chye Hin could not have been raised and/or adduced in the first suit or as fresh or further evidence in IJM's appeal at the Court of Appeal and/or the plaintiff's application for leave at the Federal Court because fraud was not an issue in the first suit as the letter that was the subject matter was rejected by the High Court and marked

as ID2. Furthermore fraud can only be established through full trial and not in appeal at the Court of Appeal or application for leave at the Federal Court.

[38] Paragraphs 29–32 of the statement of claim are about allegation of fraud committed by the defendant that must be established in a full trial (*Seruan Gemilang Makmur Sdn Bhd*). It cannot possibly be proven in the reviews at the Court of Appeal and the Federal Court. Thus the allegation that it had been determined and/or adjudicated by the Court of Appeal and the Federal Court is not right.

[39] This action cannot be an afterthought because the alleged fraud was only discovered after the first suit had been heard by the High Court and when the plaintiffs met Goh Chye Hin for clarification after the Court of Appeal decided to accept the letter although it was marked as ID2 by the High Court.

CONCLUSION

[40] After duly perusing not only the statement of claim but also the statement of defence, statement of reply, the grounds in this application and the submissions of both parties this court finds that this is not a plain and obvious case to be struck out summarily under O 18 r 19(1)(a), (b) and/or (d) and/or O 92 r 4 of the Rules of Court 2012.

[41] Both parties have raised many factual and legal issues that cannot be resolved through a minute examination of affidavits but must be meticulously addressed and determined through further documentary and *viva voce* evidence.

[42] With that this court dismissed the defendant's application with cost of RM5,000 and an allocator fee of 4%.

Striking-out application dismissed

Reported by Ashok Kumar